Rickel Home Centers, Division of Supermarkets General Corporation *and* John Rose. Case 22-CA-10429

July 8, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On September 28, 1981, Administrative Law Judge James F. Morton issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief in opposition to the General Counsel's exceptions and in support of the Decision of the Administrative Law Judge.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, as modified below, and to adopt his recommended Order dismissing the complaint in its entirety.

While we agree with the Administrative Law Judge's disposition of this case, we do not believe that the circumstances of this proceeding permit deferral to the arbitration award.[2] As counsel for the General Counsel has correctly argued in her brief, deferral to an arbitration award is an affirmative defense in which the burden of proof is assigned to the moving party. Federal Rules of Civil Procedure, Rule 8(e); *Crown Cork & Seal Company, Inc.*, 255 NLRB 14 (1980). In the instant case, Respondent has not met this burden, even to the minimal extent of offering the arbitration award into evidence. The record before the Administrative Law Judge was thus insufficient to allow any finding or conclusion other than Respondent's failure to meet its burden. Deferral to the arbitration award is, therefore, improper.

In this regard, the record indicates that employee Jack Grosso was told by Foreman John Milazzo to use a forklift[3] to unload trucks. Since Respondent's management had previously warned employees against using forklifts, Grosso was concerned about possible discipline for following Milazzo's instruction. Grosso sought out Rose, a union steward, and told him the problem. Upon hearing Grosso's concern, Rose began to leave his work area to speak with Gerald Dohn, the overall supervisor of the night shift, about the matter. Milazzo, who was the immediate supervisor of Rose as well as of Grosso, asked Rose where he was going and reminded Rose that the established grievance procedure required initial discussion of a problem with Milazzo. Rose told Milazzo that he was going to see Dohn about union business, refused to explain or even describe the problem to Milazzo, ignored Milazzo's orders to return to work, and proceeded into Dohn's office.

We conclude, as did the Administrative Law Judge, that Rose's discharge was for legitimate cause, i.e., the conduct described above, and was motivated neither by Rose's union stewardship nor by any union animus. Rose's conduct in leaving his work station without authorization, his refusal to explain his departure to his supervisor, his refusal to return to work, and his disregard for the grievance procedures established by the collective-bargaining agreement constitute insubordination unprotected by the Act and for which his status as union steward provided no immunity. *Joseph Schlitz Brewing Company*, 240 NLRB 710, 713 (1978); *Pacific Coast Utilities Service, Inc.*, 238 NLRB 599, 606 (1978); *Stop & Shop, Inc.*, 161 NLRB 75 (1966).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), we set forth the criteria for deferral to arbitration awards. We held that deferral is improper unless the following conditions are met: (1) the proceedings are shown to have been fair and regular; (2) all parties agreed to be bound; and (3) the arbitration decision is not repugnant to the purposes and policies of the Act.

[3] Also referred to in the record as a "sit down machine."

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge: On November 14, 1980 (all dates hereinafter are in 1980, unless otherwise specified), John Rose filed the unfair labor practice charge in this case against Rickel Home Centers, Division of Supermarkets General Corporation (herein called Respondent). On December 18, the General Counsel issued a complaint alleging that Respondent

violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein called the Act), by having discharged Rose on May 19 because of his activities as a steward for Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (herein called the Union). On December 24, Respondent filed its answer which placed in issue the alleged discriminatory reason for Rose's discharge.

Upon the entire record, including my observation of the demeanor of the witnesses and after careful consideration of the briefs filed by the General Counsel and the Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

As established in the pleadings, I find that Respondent maintains a warehouse in South Plainfield, New Jersey, and retail stores in the States of New York, New Jersey, and Pennsylvania in which it sells hardware and related items. Respondent's operations meet the Board's jurisdictional standard for retail concerns. The pleadings also establish and I thus find that the Union is a labor organization as defined in Section 2(5) of the Act.

II. THE ALLEGED DISCRIMINATORY DISCHARGE OF JOHN ROSE

A. *Contentions*

The General Counsel contends that Rose was discharged on May 19 by Respondent because he was vigorously pressing a grievance in his capacity as union steward. Respondent asserts: (a) that Rose's actions on May 19 were not related to any grievance or to any actions by him as a union steward; (b) that his discharge was based on his abusive and insubordinate behavior on May 19 and the fact that he was then on probationary status due to prior instances of insubordination; and (c) that, as his discharge was upheld by an arbitrator, I should defer to that award. The General Counsel urges me not to defer to that award on the ground that it is clearly repugnant to the policies of the Act by virtue of the fact that the discharge of Rose was predicated upon activities that the General Counsel asserts are protected by the Act.

B. *Background*

The essential facts are not in material dispute. Respondent has about 200 employees at its South Plainfield warehouse, which is operated on a day-shift and a night-shift basis. The Union represents the warehouse employees there and has a collective-bargaining agreement with Respondent which covers those employees.

The Charging Party, John Rose, began work for Respondent at the South Plainfield warehouse on November 16, 1976, and, prior to his appointment as union steward in November 1979, he had been disciplined on various occasions. Under the progressive system used, he was on probationary status as of September 1979. In particular, he had threatened a supervisor with bodily harm in Apil 1979, and was warned by Respondent's distribution manager then as to his conduct. In September 1979, he cursed at three supervisors in the lunchroom with may many present. As a consequence, he was suspended for a week and told his next offense would result in his being discharged.

On November 15, 1979, the Union's chief steward appointed Rose as a steward on the second shift which had two other stewards. The General Counsel offered testimony that on more than one occasion employees had asked their respective supervisors to have Rose called in to assist them as to grievances they wished to present but that the supervisors declined to bring Rose in. Respondent's witnesses testified that on a few occasions employees have asked for Rose to represent them but that, as Rose was not readily available, one of the other stewards handled the complaints.

A further background item involves the matter which gave rise to the events on May 19, as recounted in the next subsection. That item had to do with Respondent's policy governing the use of forklift trucks in unloading trucks at the warehouse. The day-shift employees have always used forklift trucks for this purpose and still do. The second-shift employees had, until sometime before May 19, been allowed to use forklift trucks for the same purpose. Apparently because there was damage done to some trucks, Respondent's distribution manager announced a new policy whereby employees on the second shift were to be restricted in the use of forklift trucks for that purpose. They were required, when assigned to load or unload trucks, to use electric power jacks instead, except when the workload required the use of forklifts for that purpose. The forklift trucks permit employees to sit down and apparently require less overall exertion by them. On occasion since that new policy was made effective, Respondent's supervisors on the second shift have specifically directed employees to use forklift trucks to load or unload trucks; those situations arose whenever there were not enough hand jacks to take care of the workload. Rose and other employees had questioned the supervisors on these occasions as to why forklift trucks were being used and were told each time that Respondent has the option, under the management-rights clause in the collective-bargaining agreement it has with the Union, to require employees to work with whatever type of equipment it assigns to them. On two or three such occasions prior to May 19, Rose had been "upset" thereby.

The final matter to be discussed as background pertains to the method of processing grievances, especially at the informal stage; i.e., before it is reduced to writing. Grievances are processed in the following manner at the South Plainfield warehouse: A steward, who is asked by an employee to assist him respecting an issue raised by a supervisor, discusses that issue directly with that supervisor in an effort to avoid the filing of a written grievance. Should that effort fail, the employee files a written grievance which, when served on the supervisor, requires a written response. If the response is unsatisfactory to him, the matter is moved to the next grievance level, and so on, with arbitration as the last step.

C. *The Events of May 19*

Rose and another warehouse employee, Jack Grosso, testified for the General Counsel. In his direct examination, Grosso testified that, on one occasion, his supervisor, John Milazzo, assigned him to work in the staging area where he used a forklift truck and that he was not then unloading any trucks. On cross-examination, his testimony indicated that that incident occurred on May 19 and that Milazzo directed him "to go into the truck" apparently with the forklift truck. Grosso further testified that he told Milazzo that he was not supposed to do that and that he did not want to be "accused." I surmise that he was thereby testifying that he was telling Milazzo that he, Grosso, should not be blamed for using a forklift truck inside the truck as he was only following Milazzo's order. In any event, Grosso's direct examination indicates that he then asked Milazzo for permission to speak to Rose but was told that Rose was not "around" and that he could talk to another union steward. Grosso testified further that he then went to the "office" and wanted to know why he was not permitted to see Rose when the night-shift supervisor told him that Rose was busy and that he had to use the services of another steward.

John Milazzo testified for Respondent. He recalled no such incident with Grosso on May 19 and testified instead that Grosso has always been a dedicated employee who always followed orders promptly and fully. Grosso was a union steward as of the date of the hearing but was not one on May 19. It is unnecessary to resolve the credibility issue existing between Grosso's account and that of Milazzo, as either version would not appear to affect the outcome of this case.[1]

Rose was working on May 19 under Milazzo's supervision as a "tugger," a position that did not require him to use a forklift. He testified that Grosso asked him why forklifts were being used inside trucks. It is undisputed that Rose left his work area and that Milazzo asked him where he was going. He told Milazzo that he had union business to attend to and that he wanted to see Gerald Dohn, the supervisor in overall charge of the night shift. Milazzo told Rose that he could not leave his work area then to see Dohn. Milazzo asked Rose what the problem was and reminded Rose that, under the normal grievance procedure, Rose is required to tell him, Milazzo, what the problem is and to discuss it with him, Milazzo, as Milazzo was then the supervisor in the area where the problem arose. Rose testified that he simply told Milazzo that it is not for him, Milazzo, to find out. Milazzo quoted Rose as simply saying, "Bullshit." Rose refused to return to work and instead walked past Milazzo towards Dohn's office. Milazzo trailed behind, trying to inform Rose that Dohn was then in a meeting with the Union's chief steward, Carson Jones. Rose paid no heed to Milazzo's remarks and went into Dohn's office, where Dohn, Carson Jones, and others were present.

Rose asked Dohn why forklift trucks were being used to unload trucks. Dohn told him to discuss that matter with Milazzo who had followed Rose into the office.[2] Milazzo took out a copy of the collective-bargaining agreement Respondent has with the Union and referred Rose to the management-rights section in it, and on which Milazzo stated he based his order for the use of the forklift trucks. Rose then stated he was not there to discuss the contract but in effect to make sure that no employee is fired for using a forklift inside a truck. Rose then told Milazzo and Dohn to shove the forklift trucks up their asses. Rose left the office and, while exiting, he pulled the office door open so vigorously that it slammed against a nearby filing cabinet. Rose's parting words to Dohn and Milazzo were that they were assholes.

Milazzo and Dohn testisfied that they later on May 19 met with Rose and Union Steward John Varianka, in order to discuss with them the recommendation they were sending to their superior to the effect that Rose should be terminated. They further testified that they ended that meeting abruptly when Rose started pounding his fists on the table and called them stupid assholes. Rose did not deny that testimony. He testified that he was simply told he was discharged and then asked to work 4 hours overtime. Neither Milazzo nor Dohn denied that they asked Rose to work overtime. The only area where Rose's account directly controverted the testimony of Milazzo and Dohn pertains to the issue as to whether Rose was told he was discharged or told only that his discharge was being recommended to Respondent's distribution manager. It is unnecessary to resolve that dispute as the result has no bearing on the merits.[3] Upon receiving Milazzo's and Dohn's recommendation to discharge Rose, Respondent's distribution manager, Harry Bailey, undertook an independent examination as to the events of May 19. He testified that, as a consequence of his investigation, he knew that the underlying incident had to do with an employee having approached Rose about Milazzo's order that forklift trucks were to be used inside trucks on May 19 and that Rose had attempted to discuss that matter with Dohn on that night.

Rose worked on May 20 and 21. He was called to Bailey's office some time after punching in to work on May 21. There, in the presence of a union representative, Bailey informed Rose that he was discharged based on the fact that he was on probation by reason of his mis-

[1] Were it necessary to make that resolution, I would credit Milazzo as Grosso's account is confused and as Milazzo impressed me as one who was forthright. Further, it is unlikely that Milazzo would have stated that Grosso had always been a dependable employee solely to have his account discredited. It is possible that Milazzo resorted to such a scheme; it is much more likely that Milazzo was speaking the simple truth.

[2] The General Counsel's brief relates that Dohn asked Rose what the problem was and argues that Dohn thereby condoned Rose's absence from the work floor. The record evidence does not support either assertion. Rose testified that when he entered Dohn's office Milazzo stated immediately that Rose should not be there and that Dohn then "told me John tell him, you know, what the problem is." Rose's subsequent testimony discloses that he and Milazzo resumed their discussion. The testimony of Milazzo and Dohn is that Dohn told Rose on May 19, when Rose interrupted Dohn's discussion with Jones, that Rose should take up his problem with Milazzo. If there were a credibility issue, I would resolve it in favor of the accounts of Milazzo and Dohn as Rose's version is at best equivocal. I view Rose's account as essentially corroborative of the accounts given by Dohn and Milazzo and make reference to it now only to clarify the issue raised by the General Counsel's contention.

[3] Were the issue crucial, I would credit Respondent's witnesses as the events disclosed that a recommendation for discharge had in fact been made to Respondent's distribution manager and that such recommendations are standard practice at the South Plainfield warehouse.

conduct towards supervisors in September 1979 and his conduct towards Milazzo and Dohn on May 19.

Rose filed a grievance rejecting his discharge. That matter went to arbitration. An attorney for the Union represented Rose. The award in that proceeding affirmed Respondent in its decision to discharge Rose.

D. *Analysis*

The first matter to be considered is whether Rose was processing a grievance on May 19. Rose's testimony is that his coworker, Gross, asked him that night to "find out about using forklifts inside a truck" and that ultimately Rose told his supervisor that he was there to make sure that Respondent does not "fire a guy" for using a forklift inside a truck. In parting, he aimed a few expletives at the supervisors present.

The General Counsel argues that the foregoing demonstrates clearly that Rose was performing a routine steward's function in representing the employees in the unit and that his use of vulgar language does not deprive him of the Act's protection.

The General Counsel's argument is premised on too narrow a view. The significant facts also include (a) Rose's being on probation for the use of profane language to supervisors, (b) his having been "upset" on several occasion before May 19 because Respondent had barred the night-shift employees from using forklifts inside trucks except when it suited Respondent's convenience, (c) Rose's refusal to talk with Milazzo until forced to despite the fact that Milazzo was responsible for the order on May 19, (d) the spurious nature of the "relief" Rose was seeking, i.e., that a night-shift employee should not be fired for complying with Milazzo's order, and (e) the intensity of the anger displayed by Rose.

The totality of the evidence discloses that Rose, from the time he became aware on may 19 that Respondent again was using forklifts inside trucks for its management needs, lost his temper completely, ignored the established grievance procedures in order to be able to vent his own anger, and, when the futility of his actions became apparent, sought to justify them by offering the frivolous reason that he was warning Respondent that no employee could be discharged for following orders.

Complaints and criticisms are insufficient to be protected by the Act when they are not related to any concerted demand or any grievance filed.[4] On that basis and the totality of the evidence in this case, I find that Rose was engaged on May 19 purely in an effort to vent his personal feelings and that his actions were not taken in furtherance of any concerted endeavor.

I find merit too in Respondent's contention that even were Rose initially engaged in processing a grievance on May 19 his subsequent conduct was unprotected. The evidence is uncontroverted that Rose was instructed by Milazzo not to go to Dohn's office during working time but to remain on the job. Despite this clear instruction, Rose left his work station and interrupted the meeting Dohn was then having with Chief Steward Jones. The evidence thus discloses that Milazzo had terminated the "informal" stage of any grievance by ordering Rose to work when Rose refused to discuss the matter with him. Rose did not have the right to extend the discussion until he was ready to end it on his own terms.[5] The General Counsel has urged that Respondent condoned the fact that Rose had bypassed Milazzo and has cited, in support of that contention, the action of Supervisor Dohn in listening to Rose's complaint. The evidence does not support that contention as Dohn, in fact, instructed Rose to discuss his problem with Milazzo and as there was no showing that Dohn was then aware of what had earlier transpired between Rose and Milazzo.

The evidence thus establishes that Rose was not engaged in an activity protected by the Act when he abused Milazzo and Dohn on May 19 and was discharged therefor.[6] There is no reason not to defer to the arbitration award upholding his discharge.[7]

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. It will effectuate the policies of the Act to defer to the arbitration award adverse to Rose.
4. Respondent has not engaged in unfair labor practices in violation of Section 8(a)(1) or (3) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[8]

The complaint is dismissed.

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[4] *Lutheran Social Service of Minnesota, Inc.*, 250 NLRB 35, 41–44 (1980).

[5] *Container Corporation of America*, 255 NLRB 1404 (1981).

[6] Had the underlying facts demonstrated that Rose was routinely engaged in a grievance discussion on May 19, I would not find that his use of expletives or the other assertive conduct he exhibited to be grounds on which he would have forfeited the protection of the Act. In this regard, see *Fall River Savings Bank*, 247 NLRB 631 (1980). I am not thereby suggesting that Respondent must tolerate the use of such language as it certainly could terminate the discussion and elect not to meet with Rose again until it had assurance that there will not be a repetition of such conduct.

[7] There is no contention or evidence that Rose did not have a fair hearing or that the arbitrator did not consider the issue underlying the instant case. The only contention raised by the General Counsel is that the arbitrator erred and I conclude he did not.

[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.